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No. 616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

McALLISTER LIGHTERAGE LINE, INC., APPELLANT

against

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,

APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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1. *The Government's summary of the evidence omits reference to the most essential facts.*—To prevent confusion, we desire to note an important omission in the Government's summary of the facts. The Government's brief, pages 4-8, in summarizing the evidentiary facts, omits entirely reference to the freighting operations of appellant with respect to which "grandfather" rights are sought. The evidence concerning these operations is summarized in our main brief, pages 12-14. The Commission did not fully describe the territorial scope of these freighting operations, but explicitly found: "Between 1931 and 1933 a

freight packet line was operated between New York and Philadelphia, Pennsylvania. This service was performed with barges propelled by a tug and a general line of commodities was carried" (R. 20). There is nothing in the Commission's decision, it should be emphasized, which lends support to the view that appellant's freighting service through 1932 was inadequate to sustain its claim to "grandfather" rights, if that service had continued to and after January 1, 1940.

2. *There is no merit in the contention that the "grandfather" clause proviso relates only to the requirement of service continuity since the "grandfather" date.*—For the first time in the course of this proceeding, appellant advances the argument (Government's Brief, pp. 15-16) that an interruption of service *prior* to the "grandfather" date is fatal, even though beyond an applicant's control. This contention is based upon the assertion that the "grandfather" proviso relates only to interruptions occurring after the "grandfather" date. Neither the Commission nor the court below took that position. Indeed, the court below impliedly rejected the construction of the "grandfather" proviso for which Government counsel contend by indicating (R. 41-42) that a remand would be appropriate in regard to the interruption of service *before* January 1, 1940, if the Commission's determination had not, in its view, been supported by another ground which the court deemed unassailable.

The interpretation of the proviso urged by Government counsel is contrary to the words of the statute.

The proviso requires an applicant for "grandfather" rights to show that he was "in bona fide operation * * * on January 1, 1940, * * * *and* has so operated since that time * * * *except, in either event, as to interruptions of service over which the applicant * * * had no control,* * * *" (49 U. S. C. 909(a); emphasis supplied). The prepositional phrase italicized above, beginning with the word "except," modifies not only the immediately preceding phrase, "has so operated since that time," but also the conjoined phrase, "was in bona fide operation * * * on January 1, 1940." The use of the coordinate conjunction "and," as the connective between these two phrases makes this clear. Thus, the canons of usage as well as the natural sense of the words negative the interpretation contended for by Government counsel, even if one accepts their suggestion that the phrase, "in either event," has reference to year-round and seasonal operators rather than to the operating status of an applicant on January 1, 1940, and since that date. But the enclosure in parentheses of the reference in the proviso to seasonal operators indicates, that "in either event," refers to the applicant's operating status on January 1, 1940, as the first "event" and to his subsequent operating status as the second "event."

If, moreover, the words of the proviso were less plain than they are, its purpose would militate against the interpretation for which Government counsel argue. As was pointed out in *Alton R. Co.* v. *United States*, 315 U. S. 15, 22, the purpose of Congress in enacting the proviso was to protect carriers already established by assuring them "substantial parity be-

tween future operations and prior bona fide operations * * *." The considerations of fairness that impelled Congress to immunize interruptions of service beyond a carrier's control occurring after January 1, 1940, apply with equal cogency to those occurring before that date. In support of the construction for which Government counsel argue, they cite in note "7," page 16, of their brief, five decisions involving motor carrier applications. In only one of these cases, however, was the "grandfather" proviso involved. We refer to *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, in which the Court's decision turned on whether bankruptcy *subsequent to the "grandfather" date* was an interruption over which the applicant had control. Manifestly, these decisions do not support the contention that the proviso immunizes only interruptions occurring after January 1, 1940.

3. *The "grandfather" clause requires the Commission, in determining whether an applicant was in bona fide operation on the "grandfather" date, to appraise the applicant's operating history for a reasonable period before that date; and the freighting service here involved was not too remote for consideration under that rule.*—The Government concedes (Brief, p. 14), that the Commission must consider operations for "a reasonable period before January 1, 1940," in determining whether an applicant was in bona fide operation on the "grandfather" date. But the Government argues (Brief, p. 15) that the suspension of appellant's regular service from 1933 compelled the Commission to disregard the 1932 operations as being too remote. A recent decision, not yet reported,

of the Commission, Division 4, in *Chatin and Pharr, Inc.*, W-115, decided January 11, 1946, granted a "grandfather" certificate even though, as Commissioner Miller noted in his dissenting opinion, "the fact is that [the applicant] performed but a single instance of transportation subject to the Act during the 11-year period from 1929 to January 1, 1940, and only three instances of such transportation since that date." If this 11-year hiatus was not deemed a fatal break in service continuity, on what rational basis can Government counsel contend that the much shorter hiatus here involved is too "remote" (R. 21).

4. *The Commission's omission to make findings concerning the interruption of service before the "grandfather" date is not immaterial as a matter of law.*—The Government (Brief, pp. 17-21) attempts to counter the Commission's omission to find the facts concerning the cause for the interruption in appellant's service during the economic depression, that is prior to January 1, 1940, by contending that the omission is immaterial as a matter of law. This contention rests upon the argument that the failure of a carrier to obtain traffic which results from a general economic depression must, under the doctrine of the *Gregg Cartage* case (316 U. S. 74), be viewed as an interruption of service within the applicant's control. Although it is reasonable to say, as a majority of this Court held in the *Gregg Cartage* case, that a carrier's bankruptcy is a misfortune stemming from circumstances within his control, it is unreasonable to argue that a carrier has control over the economic life of the entire community, and the Government's attempt to apply the

Gregg rationale to an economic depression proceeds on that patently specious premise. The fundamental cause for the carrier's plight in the *Gregg* case was its error of business judgment in selecting an insurance underwriter. Hence, the cause of the bankruptcy was within the carrier's control. And, since in virtually every business failure inadequacy of business foresight lies at the root of the failure, the Court could reasonably hold, as it did, that scrutiny by the Commission of the particular shortcomings that culminated in the insolvency was not required. Stated otherwise, it may be assumed in this workaday world that a man controls his own business destiny. A general economic depression, on the other hand, is the product of a multiplicity of causes which are rooted in worldwide economic and political conditions. To suggest that a single carrier has it within his power to control such a disaster is, we submit, to forsake all reason. As the Government points out (Brief, p. 17), the Commission has recognized that a drought which destroys a carrier's chief source of business is a cause beyond the carrier's control. There is surely as much reason to regard an economic depression which destroys a carrier's sources of business as such a cause.

In its endeavor to bring the instant case within the *rationale* of the *Gregg Cartage* decision, the Government has subtly distorted the facts of the present case. The distortion occurs at pages 18 through 20 of the Government's brief. The evidence summarized in our main brief, page 14, revealed that the impact of the economic depression upon appellant's sources of traffic was so severe that appellant was compelled to lay

up most of its vessels, a condition which at its worst resulted in the idleness of all but one tug and a few barges of a fleet numbering more than a hundred vessels. The Government's brief distorts these facts by intimating that appellant voluntarily put its vessels to work in New York Harbor when the depression occurred as a measure of "prudent retrenchment of the scope of appellant's water carrier operations" (Government's Brief, pp. 18-19); that appellant as a matter of "business judgment" (*id.* p. 20) sought to mitigate "the effects of a depression by curtailing the geographical area to be served by it (rather than seeking larger volume and lower unit costs by expanding its business and seeking wider markets)" (*id.* p. 20). In short, the Government would have it appear that during the depression appellant voluntarily kept its large fleet *busy* in New York Harbor because to do so was more profitable than to continue operations along its regular coastwise route. The fallacy in the argument lies in its false fact premises. As has just been noted, appellant was not able to keep its fleet employed during the depression; it was in the predicament of being unable, though bending every effort, to obtain traffic in or outside New York Harbor, with the result that most of its boats lay idle.

5. *The employment of appellant's fleet in essential war work was not a suspension of its regular service over which it had control, within the intendment of the "grandfather" proviso.*—The Government argues that appellant voluntarily chose to engage in war work, rather than to perform its regular coastwise freighting service (Government's Brief, pp. 22-

27), from which it contends that it forfeited its "grandfather" rights. In our main brief we pointed out that in *American-Hawaiian S.S. Co., Common Carrier Application*, 250 I. C. C. 219, 222; 3 Federal Carriers Cases, par. 30,223, the Commission held that:

> "Interruptions of service by a water carrier subject to the act, directly resulting from compliance with a request of the Maritime Commission, *in the interest of national defense*, are recognized by us as interruptions in service beyond the control of the carrier. * * *"[1] (Italics supplied.)

The "request" of the Maritime Commission could not have been considered by the Commission an essential factor in its decision. The principle of the decision was that a diversion of a carrier's vessels to essential war service is not an interruption of service that works a forfeiture of "grandfather" rights; a contrary interpretation of the proviso would thwart "the interest of national defense" (the *American-Hawaiian* case, at p. 222), a result manifestly opposed to the Congressional purpose. The only other interpretation of the *American-Hawaiian* opinion is that such a diversion must, in the setting of war-time shipping control, be regarded as an interruption of service beyond an applicant's control. A recent Com-

[1] A similar conclusion was reached in other Commission proceedings. *See Agwilines, Inc., Common Carrier Application*, 250 I. C. C. 339, 345; *Southern Pac. Co., Common Carrier Application*, 250 I. C. C. 457, 461 [3 Federal Carriers Cases par. 30,389]; *California Eastern Line, Inc., Application*, 250 I. C. C. 677, 678 [3 Federal Carriers Cases par. 30,572].

mission decision confirms our understanding of the *American-Hawaiian* doctrine. We refer to *Northland Transportation Co., Common Carrier Application;* No. W-351 (December 21, 1945), 5 Federal Carriers Cases, par. 31,041. In the *Northland* case, it appeared that the applicant withdrew its vessels from their customary intercoastal trade and placed them in foreign trade at a time when the Maritime Commission was attempting, as the applicant knew, to persuade the intercoastal lines through negotations with their shipping associations to divert tonnage to foreign trade. The protestants argued that the interruption was not beyond the control of the Northland Company because, admittedly, the applicant's motive was to take advantage of the more remunerative charter rates afforded by the foreign trade. The protestants argued, further, that the Maritime Commission had not requested or ordered the applicant to engage in the foreign service. In rejecting these contentions, the Commission reviewed the measures which the Government had adopted to control domestic shipping, and pointed out that, "It was made clear [to the intercoastal shipping lines through the Maritime Commission's discussions with their shipping associations], and applicant so understood it, that unless the necessary tonnage of vessels could be obtained by voluntary release, the Government would requisition them" (the *Northland Transportation Co.* decision, 5 Federal Carriers Cases, par. 31,041.03). In view of this, the Commission held that the diversion was beyond the applicant's control, and granted the application.

The parallel between the *Northland* and the instant case, is apparent. Indeed, the public authority which would have been exercised, had the Northland Company not anticipated the necessity for its exercise by voluntarily diverting its vessels to foreign trade, that is, the Government's requisition power, would unquestionably have been employed had appellant not placed its vessels in the essential war service that it did. Furthermore, the argument that appellant could have operated its regular coastwise freighting service is belied by the fact that the Office of Defense Transportation required the owners of barges plying the Atlantic Coast to confine their use to the movement of coal in bulk as a means of freeing railroad equipment that was desperately needed for other purposes (R. 174-175; cf. ODT General Order No. 15, sec. 502-35, which exerted the ODT's control over coastwise vessels as a step in regulating the coal movement). To accomplish this object without causing loss to the coal receivers, the Government through the Reconstruction Finance Corporation subsidized the movement by granting a subvention to compensate for the added transportation cost. Appellant could not, therefore, have carried on its regular freighting service without running counter to the Office of Defense Transportation's known policy and restraining powers.

Respectfully submitted,

MAURICE A. KRISEL,
ROMAN BECK,
Attorneys for Appellant.